1994

The State of Utah v. Debra A. Hodges : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	940045-CA
Plaintiff/Appellee,	:	
v.	:	
DEBRA A. HODGES,	:	Case No. 940045-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202, and theft, a class B misdemeanor, in violation of Utah Code Ann. §§ 76-6-404, 76-6-412(1)(d), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony. Cf. Utah R. Crim. P. 26(2)(a).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and rules are contained in the text of this brief or in Addendum A:

Utah R. Evid. 403
Utah R. Crim. P. 16(a)(5)
Utah Code Ann. § 76-6-202
Utah Code Ann. § 76-6-404

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court err when it allowed the jury to consider testimony concerning threats allegedly made against State witnesses when such after the fact evidence, even if true, was likely to prejudice the deliberation process? While "an admissibility decision is the sum of several rulings, each of which may be reviewed

under a separate standard[,] . . . the correctness standard is applied only to the trial court's ultimate conclusion to admit or exclude the proffered evidence. . . . To the foregoing extent, then, the statement in Ramirez that admissibility is always a question of law is correct". State v. Thurman, 846 P.2d 1256, 1270 n.11 (Utah 1993) (construing State v. Ramirez, 817 P.2d 774 (Utah 1991)); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) ("we accord conclusions of law no particular deference, but review them for correctness").

2. Did the trial court err in not excluding the testimony of a State witness who had not been disclosed to the defense as a potential witness? "The trial court's decision that the State was not required by Rule 16 to give such notice before trial was a legal conclusion and we therefore review that conclusion for correctness." State v. Tennyson, 850 P.2d 461, 472 (Utah App. 1993).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202, and theft, a class B misdemeanor, in violation of Utah Code Ann. §§ 76-6-404, 76-6-412(1)(d), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, presiding. On November 19, 1993, a jury convicted Debra A. Hodges of the above charges. (R 99-100).

On December 20, 1993, the trial court sentenced Ms. Hodges to an indeterminate prison term of one-to-fifteen years in the Utah State Prison for the burglary conviction. Various court ordered

amounts were also imposed. (R 107). An accompanying sentence, a six month term for the misdemeanor conviction, ran concurrently with the indeterminate sentence. (R 108).

Other facts, including those procedurally pertinent to the issue involving the prosecution's surprise witness, Ruth Ann Smith, are recounted in full below.

STATEMENT OF THE FACTS

On June 14, 1993, the State filed an Information against Debra Hodges which charged her with burglary and theft and which based its allegations on the information provided by four witnesses (Edward Johnson, Teresa Chistensen, Ken White and Gil Arenaz). (R 7-8). On June 16, 1993, the Salt Lake Legal Defender Association ("LDA") entered an appearance of counsel and formally requested the State to provide the defendant with "A list of all the witnesses that the State intends to call for trial in the above-entitled matter, their addresses, telephone numbers and criminal records." (R 17-20). Ruth Ann Smith was not one of the witnesses listed by the State.

On July 13, 1993, the State called three witnesses (Edward Johnson, Teresa Christensen, and Kenneth D. White) during the preliminary hearing for the case at bar. (R 3). Ruth Ann Smith was not included.

On September 8, 1993, the State wrote defense counsel to inform him of four additional trial witnesses: William Connors, Leo Pacheco, Dr. Mark Davis, and Dr. LeRoy Anderson. No mention was made

of Ruth Ann Smith.

On the morning of trial, November 18, 1993, the State for the first time announced its intention of calling Ruth Ann Smith as a witness, notwithstanding its "acknowledge[ment] that [Ms. Smith's] name was not furnished to defense counsel prior to coming to trial today because we didn't have it." (R 130, 139). However, the trial court alluded to the claim that Ms. Smith was "referred to by first name only in the report of June 11th, 1993 by Detective Arenaz in the second paragraph of the first page . . ." (R 137, 139-40).

"The court [went on to] find that there was insufficient information disclosing the identity of Ruth Ann Smith to the defense in the report as to only her first name and, thus, the State's motion to include Ruth Ann Smith as a potential witness in this case is denied and she will not be allowed to testify." (R 143). Irrelevant to the court was the State's argument that, one, Ms. Smith had only "called Detective Arenaz this morning [November 18]", and two, other State witnesses were unavailable at the time of trial. (R 136, 140, 143).

After the State presented its case-in-chief, the court reversed its own pretrial ruling and allowed Ruth Smith to testify. (R 227). Ms. Smith's testimony, however, revealed contradiction's in the State's claim that it had "just [been] informed during the break after the selection of the jury and before the court began reading instructions to the jury that a Ruth Ann Smith has come forward and offered to be a witness." (R 136). Contrary to the State's representations, Ruth Ann Smith's presence at trial resulted from a

subpoena -- a process which did not occur on its own and one which began well before jury selection. (R 256, 261). While the State may not have known "of her [Smith's] willingness to testify until [the] morning [of trial,]" (R 240) (emphasis added), the State had nonetheless issued a subpoena beforehand. Counsel for Ms. Hodges did not receive appropriate notice prior to the start of trial.

Trial testimony revealed that during the early morning hours of June 3, 1993, Edward "Pete" Johnson awoke to find an intruder in his darkened apartment. (R 152, 215). At the time of the intrusion, Johnson was not wearing his prescription glasses. (R 152, 163, 169-70). The apartment lights were off and the intruder's head was covered by a nylon stocking. (R 152, 163, 169-70).

A struggle ensued, during which the intruder apparently said "something but I [Johnson] couldn't understand it. It sounded like Chinese or something." (R 164-65). Johnson did not recognize the voice. (R 165). While Johnson managed to remove the stocking, he conceded that the person may have been someone other than Debra Hodges (a "white" female resident in the same apartment complex). (R 151, 167); State's Exhibit 1-S. The person seen leaving Johnson's apartment was described as being 5'9" tall. (R 288). Debra Hodges is 5'4"; another resident in the complex, Ruth Ann Smith, is 5'8" tall and admitted that she was involved. (R 280). Approximately $20 was taken from Johnson's wallet. (R 301).

Ruth Ann Smith testified that there was a stocking, "but mine came -- I tried to put one on but it didn't stay on. It came off. I didn't have one at the time." (R 281). Smith attempted to

shift blame for the incident from herself to Ms. Hodges.

Ruth Ann Smith is an addict, an alcoholic who had been drinking and using drugs (valium, cocaine, alcohol) at the time in question. (R 258, 260). Smith claimed that using drugs had not affected her senses or her ability to perceive the incident. (R 258). She also testified that she did not confess earlier because she "didn't want to go to jail." (R 257, 262). At trial, though, Smith claimed that her fear of jail was now outweighed by her "[guilt for] what happened." (R 257, 259, 262). Smith also has another charge pending for a different offense and has been booked into jail on three separate occasions. (R 257, 278).

Two of the State's other witnesses, Kenneth White and Teresa Christensen, testified about matters which had been previously deemed inadmissible. (R 132). Prior to trial, counsel for Ms. Hodges sought to prevent the State from "attempt[ing] to elicit [sic] testimony regarding some phone call made subsequent to the conduct alleged in the information[.]" (R 130). "There was no identification of Ms. Hodges in the phone call . . ." and the alleged conversation was considered "more prejudicial than probative." (R 130). According to State witnesses, in phone conversations made after the incident but before trial, Hodges had threatened them and told them not to testify. (R 130).

At trial, Kenneth White testified that he had witnessed part of the incident involving Edward Johnson and the intruder. (R 174-79). Mr. White and Mr. Johnson both suffer from

schizophrenic disorders. (R 158-59, 187). Ken White said the intruder was Debra Hodges. (R 177).

Mr. White also claimed that "about four or five days afterwards[,]" Hodges called him and threatened him with "You're dead, you're dead." (R 180, 186). The State further emphasized the alleged threatening conduct by calling Teresa Christensen, an apartment resident who had seen nothing during the time in question. (R 201).

However, Ms. Christensen claimed that "a day or two after" the incident she heard Debra Hodges admit her involvement. (R 202). Then, "a week or two" later, Christensen testified that Hodges had threatened her at a bar. (R 204). According to Christensen, "she [Hodges] had been watching me all night, kind of giving me, you know, we had looks, and then after all my friends left she came over to the table and she said that if I were to testify against her she knew of some man, somebody that would come and I would be dead. I would be killed. If I testified against her." (R 204). Christensen also stated that "she [Hodges] just walked away. Says, you're dead, and walked away." (R 204-05).

Based upon the evidence presented, the jury convicted Debra Hodges of burglary and theft. (R 310-11). The alleged threats apparently influenced the presiding judge as well since at the close of trial the court denied Ms. Hodges' request for continued release pending sentencing. (R 326). "The court does believe that the defendant has been very inappropriate in contacting other witnesses.

. . . Those calls to the other witnesses involved threats to their lives and I simply cannot tolerate that." (R 326). Ms. Hodges then filed this appeal.

SUMMARY OF THE ARGUMENT

The trial court erred when it allowed the State to present testimony concerning alleged threats made by Ms. Hodges against its witnesses. Such allegations have no legal relevance to Ms. Hodges mental state at the time of the incident and even assuming, arguendo, that such after-the-fact threats were made, the prejudicial nature of death threats far outweigh any probativeness. Inflammatory comments tend to confuse the jury or lead them to base their determinations on circumstances other than the pertinent evidence.

The trial court also erred when it allowed the State to call Ruth Ann Smith, a witness used without prior notification to the defense and a last minute insertion which required changes in Ms. Hodges' theory of the case. The court also erroneously denied Ms. Hodges' request for a continuance (for purposes of uncovering the true motivations behind Ms. Smith's sudden desire to testify).

ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT ALLOWED TESTIMONY REGARDING ALLEGED THREATS MADE AGAINST STATE WITNESSES

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . ." Utah R. Evid. 403 reprinted in State v. Maurer, 770 P.2d 981, 983 (Utah 1989). In Maurer, our supreme court cited with approval the principles underlying State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972), an opinion with facts virtually identical to the case at bar. Maurer and Marler both involved admissibility decisions wherein the trial court exceeded the "bounds of the 'reasonable or permissive range' of discretion." Maurer, 770 P.2d at 984.

As in Ms. Debra Hodges situation, the defendant in State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972), objected to testimony concerning alleged threats made against State witnesses. Compare (R 130, 180, 183, 186), with Marlar, 498 P.2d at 1280. Dennis Marlar apparently had telephoned a witness and told him not to testify. Over objection from Marlar's counsel, the trial court allowed the jury to consider the following conversation:

> Q. [By the State] Did he [Marlar] ever call you at 2:30 in the morning on one occasion?
>
> A. [State witness] Yes, sir.
>
> Q. You remember what the substance of that conversation was?

> A. Essentially that the manner in which the parties involved were going to testify and that I responded to saying that 'that just however they testified would have to be the way they testified,' and I said that 'I didn't want him calling my home anymore,' and he said profanity and then 'I'll put you in the morgue.'

Marlar, 498 P.2d at 1280 (emphasis added).

This conversation, the State argued, was legally relevant in two respects. "[F]irst, that the evidence tends to establish the then-existing state of mind of appellant or his intent in committing the alleged assault; and second, that the subject matter of the phone calls and the consequent threatening gesture by the caller (I'll put you in the morgue") connotes an implied admission of guilt or consciousness of a weak case." Marlar, 498 P.2d at 1282. The Marlar Court found "neither of these propositions persuasive." Id.

> The crucial issue on relevancy, and hence the admissibility of threats, is the sufficiency of the threat as indicative of the requisite state of mind. The statement "I'll put you in the morgue" (even if made by appellant) does not, in itself, tend to establish an intent or state of mind at the time of the commission of the criminal offense. The statement, at most, was an opprobrious remark illustrating the caller's malevolent attitude toward the witness Higgins at the time the statement was made.

Id. at 1283 (emphasis added and citations omitted).

Furthermore, "[e]ven if we could glean some probative value from the telephone conversation evidence [e.g. implied admission of guilt], it would be so slight that its admittance into evidence would not be justified in light of the possible prejudice to appellant." Id. "[B]ecause of the inflammatory effect which the

threat might have on the jury, it should not have been admitted. [Since] such inflammatory evidence . . . 'serves only to inflame the minds and passions of the jury to the prejudice of the defendant' it is well settled that its admission is reversible error." Marlar, 498 P.2d at 1283 (citations omitted). "The fact that there may have been adequate independent evidence to convict the accused apart from the inflammatory evidence provides no salvation to the prosecution." Id.

During Ms. Hodges' trial, the court allowed even greater prejudicial evidence to mislead the jury. Over objection from defense counsel, (R 183-84), the court allowed Teresa Christensen to testify about a threat allegedly made by Hodges at a bar. (R 204). According to Christensen, "she [Hodges] had been watching me all night, kind of giving me, you know, we had looks, and then after all my friends left she came over to the table and she said that if I were to testify against her she knew of some man, somebody that would come and I would be dead. I would be killed. If I testified against her." (R 204). Christensen also claimed that "she [Hodges] just walked away. Says, you're dead, and walked away." (R 204-05).

Another State witness, Kenneth White, made similar allegations over objections from Ms. Hodges' counsel. (R 183-84). White told the jury that "about four or five days [after the June 3 incident,]" Hodges called him and threatened him with "You're dead, you're dead." (R 180, 186).

The trial court, however, erroneously linked the allegations concerning Ms. Hodges' "after-the-fact" conduct with evidence bearing upon the "then-existing" mental state:

> if the defendant makes threatening phone calls in relation to one of the witnesses that's testifying in this case, that is in relation to this offense. What I'm thinking of in your [Ms. Hodges] motion in limine, I'm thinking of an unrelated act like, perhaps, a forgery in some other year or some other kind of act, but anything that's related to this offense, threatening phone calls, if she [Hodges] made them, would go to the facts of this case and would be measured and judged by the jury as to their weight and their reliability by the jury determining whether to believe the witness. That invades exactly the prerogative that I think is preserved for the jury.

(R 183-84) (emphasis added); accord (R 256).

Contrary to the court's beliefs, what Ms. Hodges did or did not say does "not in itself tend to establish an intent or state of mind at the time of the commission of the criminal offense." State v. Maurer, 770 P.2d 981, 986 (Utah 1989) (emphasis added) (construing State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972)). "The statement, at most was an opprobrious remark illustrating the caller's malevolent attitude towards the witness Higgins at the time the statement was made [i.e. after the incident]." Marlar, 498 P.2d at 1283 (emphasis added) quoted in Maurer, 770 P.2d at 986. Threatening phone calls, even if true, have no legal relevance in regards to the elements of the crime.

Moreover, as recognized in Marlar, "[e]ven if we could glean some probative value from the telephone conversation evidence, it would be so slight that its admittance into evidence would not be

justified in light of the possible prejudice to appellant." 498 P.2d at 1283. The prejudicial impact of the threats were no better reflected than through the lower court's own statements.

In ruling that Ms. Hodges could not remain on continued release pending sentencing, the court concluded, "The court does believe that the defendant has been very inappropriate in contacting other witnesses. . . . Those calls to the other witnesses involved threats to their lives and I simply cannot tolerate that." (R 326). The jury's judgment may have been similarly swayed, with a lack of tolerance or emotional response fueling an "instinct to punish or otherwise divert the jury from its task to determine the mental state of defendant at the time of the [incident]." Maurer, 770 P.2d at 987.

"[B]ecause of the inflammatory effect which the threat might have on the jury, it should not have been admitted." State v. Maurer, 770 P.2d 981, 986 (Utah 1989) (construing Marlar, 498 P.2d at 1283). Other evidence independent of the threats cannot save the conviction. Marlar, 498 P.2d at 1283. Debra Hodges's conviction should be reversed. Id.; see Maurer, 770 P.2d at 987.

POINT II

THE TRIAL COURT ERRED WHEN IT ALLOWED TESTIMONY FROM A "SURPRISE" STATE WITNESS NOT PREVIOUSLY DISCLOSED TO THE DEFENSE

In State v. Knight, 734 P.2d 913 (Utah 1987), the supreme court expressed concern with a prosecution's response to a discovery request which may "misled-the-defense":

> an incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.
>
> We agree that the prosecutor's failure to respond fully to a . . . request may impair the adversary process in this manner.

Knight, 734 P.2d at 917 (quoting United States v. Bagley, 473 U.S. 667 (1985) (citations omitted)).

In the present case, the record establishes that counsel for Ms. Hodges had requested the State to provide "A list of all the witnesses that the State intends to call for trial in the above-entitled matter, their addresses, telephone numbers and criminal records." (R 17-20); cf. Knight, 734 P.2d at 917 (such requests "specifically and unmistakably [seek] disclosure of [Utah R. Crim. P. 16](a)(5) material consisting of the names and addresses of witnesses and their statements"); Utah R. Crim. P. 16(a)(5) states, "Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge . . . any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense").

However, Ruth Ann Smith was never named as a State witness. She did not testify at the preliminary hearing and the State even acknowledged "that [Ms. Smith's] name was not furnished

to defense counsel prior to trial today because we didn't have it." (R 130, 139). While Ms. Smith's own testimony revealed that a subpoena prompted her appearance, (R 261) -- a representation at odds with the State's claims, her impact on the trial was undeniable.

Without Ms. Smith, the State had little more than a victim unsure in his identification, (R 151, 167); a neighbor's perception of the intruder's voice, "shape", and clothes, (R 179); and inadmissible allegations concerning death threats. See supra Point I. With Ms. Smith, the State now had a focus different from its pretrial presentation of witnesses, (R 139), its case-in-chief having changed without notice to suddenly emphasize a claimed accomplice who allegedly acted as a "lookout" for the burglary. The State's "eleventh-hour" witness severely hampered the defense's ability to prepare and counter such claims. Cf. Knight, 734 P.2d at 917 (quoting Bagley, 473 U.S. at 682 (having been misled, "the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued")).

Counsel for Ms. Hodges attempted to mitigate the impact of the unexpected testimony by requesting a continuance, cf. State v. Christofferson, 793 P.2d 944, 948 (Utah App. 1990), but the trial court denied the request. (R 246). Ms. Hodges was left with little time to investigate Ruth Ann Smith's motivations for testifying, to uncover legitimate reasons other than her claim that she "can't have good recovery unless I'm [Smith] honest[,]" (R 258), or her denials that other prior arrests had affected her willingness to so readily

incriminate herself in the involved burglary, (R 257-58), or Smith's uncharacteristic sense of comfort with the prosecution, (R 246-47), one which a three time arrestee would not be expected to have.

Unlike the situation in State v. Tennyson, 850 P.2d 461 (Utah App. 1993), where this Court held "that the State was not precluded from calling a rebuttal witness not disclosed before trial in circumstances where it, in good faith, had no reason to expect the need for such witness before trial[,]" id. at 473 (emphasis added), the State's use here of a key witness should have been disclosed formally to Ms. Hodges because it expected or should have expected the need for her testimony, see State's Exhibit 1-S (Officer Arenaz's police report), prior to the morning of trial. The trial court's decision to allow Ms. Smith to testify should be reversed.

CONCLUSION

Debra Hodges respectfully requests that this Court reverse her conviction and remand this case for a new trial.

SUBMITTED this 24th day of May, 1994.

RONALD S. FUJINO
Attorney for Defendant/Appellant

ROGER K. SCOWCROFT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 24th day of May, 1994.

RONALD S. FUJINO

DELIVERED by _____

this 24 day of May, 1994.

ADDENDUM A

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over